

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

EDWARD GLEBA,  
*Petitioner.*

No. 2 CA-CR 2018-0194-PR  
Filed November 14, 2018

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
NOT FOR PUBLICATION  
*See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).*

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Petition for Review from the Superior Court in Maricopa County  
No. CR2012148610001DT  
The Honorable Phemonia L. Miller, Judge Pro Tempore

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

William G. Montgomery, Maricopa County Attorney  
By Adena J. Astrowsky, Deputy County Attorney, Phoenix  
*Counsel for Respondent*

Edward Gleba, Tucson  
*In Propria Persona*

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**MEMORANDUM DECISION**

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Staring and Chief Judge Eckerstrom concurred.

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B R E A R C L I F F E, Judge:

¶1 Petitioner Edward Gleba seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4 (App. 2007). Gleba has not sustained his burden of establishing such abuse here.

¶2 After a second jury trial,<sup>1</sup> Gleba was convicted of four counts of aggravated driving under the influence (DUI). His convictions and sentences were affirmed on appeal. *State v. Gleba*, No. 1 CA-CR 14-0237 (Ariz. App. Feb. 4, 2016) (mem. decision). Gleba thereafter sought post-conviction relief, arguing in his petition that he had received ineffective assistance of counsel in regard to plea negotiations, a motion to suppress, and cross-examination of the arresting officers. He also maintained that the charges against him were "duplicitous and prejudicial," that the trial court erred in declaring a mistrial in a first trial, and that the jurist who presided over his trial lacked the authority to do so. The trial court summarily denied relief, and also denied Gleba's motion for rehearing.

¶3 On review, Gleba argues his due process rights were violated in regard to the testing methods used to establish his blood alcohol concentration (AC) and suggests witnesses presented perjured testimony. He also again asserts that trial counsel was ineffective in failing to adequately cross-examine witnesses, now also asserting that counsel failed to adequately prepare for trial. And he maintains the trial court erred in summarily dismissing his petition.

¶4 We will not address Gleba's claims of trial error abandoned on review, *see* Ariz. R. Crim. P. 32.9(c)(4)(D); *State v. Rodriguez*, 227 Ariz. 58,

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<sup>1</sup>Gleba's first trial ended in a mistrial after the jury was unable to reach verdicts.

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n.4 (App. 2010), nor those claims raised for the first time on review, *State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980). We therefore address only the claims of ineffective assistance of counsel presented to the trial court and asserted on review. To prevail on these claims, Gleba was required to demonstrate both that counsel's performance was deficient and that he was thereby prejudiced. See *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Nash*, 143 Ariz. 392, 397 (1985). "To establish deficient performance, a defendant must show that his counsel's assistance was not reasonable under prevailing professional norms, 'considering all the circumstances.'" *State v. Kolmann*, 239 Ariz. 157, ¶ 9 (2016) (quoting *Hinton v. Alabama*, 571 U.S. 263, 273 (2014)). "To establish prejudice, a defendant must 'show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting *Hinton*, 571 U.S. at 274). "Matters of trial strategy and tactics are committed to defense counsel's judgment" and cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. Beaty*, 158 Ariz. 232, 250 (1988).

¶5 Gleba contends counsel failed "to cross examine and present contrary evidence of the" malfunctioning of a gas chromatography machine. Before the first trial, trial counsel filed a motion to suppress, seeking to exclude evidence of Gleba's AC based on questions about the Scottsdale Crime Laboratory's methodology and the reliability of a particular gas chromatograph used in the laboratory. The motion was based on a group of eleven cases heard in the superior court, in which the defendants argued for exclusion of AC-testing results of a particular gas chromatograph, based on problems with the machine and emails discussing those problems, relating to tests completed in 2009 to 2011. Those cases have since been addressed by our supreme court, which concluded the trial court in those cases should not have excluded the test results, but that jurors could "consider the instrument's malfunctioning and the laboratory staff's related concerns when assessing the weight or credibility of the test results." *State v. Bernstein*, 237 Ariz. 226, ¶¶ 19, 22 (2015).

¶6 At the evidentiary hearing on Gleba's motion, trial counsel questioned the state's expert about the machine used for Gleba's test, performed in April 2012. The expert testified he was unaware of any attempt to return the machine to its manufacturer, but testified about a problem the device had in transferring valid test results to "the database where the final report was being generated." The trial court denied Gleba's motion, concluding "there was no evidence presented" that the gas

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chromatograph used to test his blood was unreliable or malfunctioning at the time of that test.

¶7 Gleba appears to contend that counsel believed he could not question the expert about the problems with the machines because the trial court had denied the motion to suppress and that such a belief was an “unreasoned judgement.” But counsel did question the expert about the recalibration of the machines at trial. It is unclear from Gleba’s argument what further information he believed counsel should have presented, but in any event, questions of tactical approach in cross-examination are questions of strategy that cannot form the basis for a claim of ineffective assistance of counsel. *See State v. Stone*, 151 Ariz. 455, 461 (App. 1986).

¶8 Gleba also contends trial counsel was ineffective in failing to adequately challenge the testimony of Scottsdale Police officer Robert Rowley relating to his actual physical control of the vehicle. At Gleba’s first trial, Rowley testified that he had not seen Gleba driving; he had been seated on the curb when he arrived at the scene after being called by another officer. He testified that Gleba’s vehicle was “next to a two-lane driveway” “on the west side of Brown Road.” He was uncertain which of two driveways in the area the vehicle had been near. At Gleba’s second trial, Rowley again testified the vehicle was parked on one side or the other of a “double-sided driveway.” Gleba argues Rowley’s testimony was the only evidence of his driving or physical control of the vehicle, and that “no other substantial evidence was presented by the state nor alleged to prove the fact that petitioner had actually driven the vehicle anywhere.” But, on the record before us, two other officers testified or reported that they had seen the car moving on the road, pull over at the side of the road, and the driver—later identified as Gleba—get out. Thus, even were we to accept Gleba’s argument that Rowley “move[d]” his vehicle “‘120 feet’ from the factual position” in which he asserted it was parked, we cannot say Gleba has established any prejudice resulting from any alleged deficiency in counsel’s not having further cross-examined Rowley on the point.

¶9 We therefore grant the petition for review, but deny relief.